IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2006-0236
Appellee,	)	DEPARTMENT A
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
CAROLYN WADDLES,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20053503

Honorable Kenneth Lee, Judge

AFFIRMED IN PART AND REVERSED IN PART

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B R A M M E R, Judge.

¶1 Appellant Carolyn Waddles was charged with transportation of marijuana for sale, second-degree money laundering, possession of drug paraphernalia, and obstructing a

criminal investigation. She was convicted of all charges after a jury trial. The trial court sentenced her to a substantially mitigated prison term of three years on the marijuana conviction. It suspended the imposition of sentence on the remaining charges and imposed probationary terms. On appeal, Waddles maintains the trial court erred in denying her motion for judgment of acquittal on the obstruction of justice charge and claims the charge of money laundering was duplicitous and violated her right to a unanimous jury verdict.

¶2 The evidence, viewed in the light most favorable to sustaining the convictions, *State v. Henry*, 205 Ariz. 229, ¶ 2, 68 P.3d 455, 457 (App. 2003), established the following. A Tucson police officer responded to a citizen's report of suspicious activity at a neighbor's home. The citizen knew his neighbor was away but saw people, a black Nissan, and a van coming and going from the house. When the officer arrived, Waddles approached him but appeared nervous, and her hands began to shake when the officer spoke to her. Waddles told the officer she was at the house of her friend, with his permission, but denied knowing anything about a black Nissan or a van. When the officer asked her to call the friend to verify that she had permission to be there, Waddles told him the friend had said he did not want other people there and did not want the police at the house. Waddles called the friend, who confirmed to the officer that Waddles had permission to be there. At that point, another person, Dennis Thompson, came out of the house; he, too, seemed nervous. He and Waddles both denied anyone else was in the house.

¶3 When the officer looked inside the house, he noticed there was no furniture and the house smelled of carpet deodorizer. Ten minutes after leaving the house, the officer from a distance saw Waddles drive a van out of the garage with Thompson in the front passenger seat. The officer stopped the van and called for assistance after seeing a third person "pop up" in the back. Because a drug detection dog alerted to the van, officers searched Waddles's purse, in which they found marijuana and a large amount of cash. They then searched the house and the van and found more money in the van. Inside Waddles's purse, officers also found a shipping receipt for a package that had been sent, which subsequently proved to contain 11.2 pounds of marijuana. Officers found additional evidence of drug transactions as well.

¶4 Waddles was charged with obstructing a criminal investigation or prosecution by "knowingly attempt[ing] by means of bribery, misrepresentation, intimidation, force or threats of force, to obstruct, delay or prevent the communication of information or testimony relating to TRANSPORTATION OF MARIJUANA FOR SALE, to a peace officer . . . ." She moved for a judgment of acquittal at the close of the state's case pursuant to Rule 20, Ariz. R. Crim. P. She argued the state had failed to present sufficient evidence that she had lied to the officer in connection with his original investigation, which concerned a possible criminal trespass, not the transportation of marijuana for sale. The prosecutor responded, "But the misrepresentation has to relate to someone else, and it has to have as your intent the goal of keeping the police from talking to a third person, is how I understand the case

law. And she did that when she told Officer Payette there was no one else in the house . . . . And she also misrepresented to the police her connection to the van . . . ."

¶5 On appeal, Waddles contends she could not be convicted of obstructing justice because the state's theory of the case—and what the evidence showed, at best—was that she had lied to the police officer to prevent him from communicating with a third person, and the officer was investigating her possible criminal conduct, not a third person's. Waddles maintains that by denying the motion for judgment of acquittal, the trial court demonstrated its misunderstanding of A.R.S. § 13-2409 and the case law decided thereunder. Relying largely on *Walker v. Superior Court*, 191 Ariz. 424, 956 P.2d 1246 (App. 1998), Waddles argues that "the misrepresentation must be made to a third person who is not law enforcement" and that here, instead, the state argued and the evidence showed that she had lied to the officer.

¶6 The question Waddles raises requires us to interpret the statute and determine whether the trial court interpreted it correctly, an issue we review de novo. *See State v. Carrasco*, 201 Ariz. 220, ¶ 4, 33 P.3d 791, 793 (App. 2001). "If the language of a statute is clear and unambiguous, this court must give it effect. In doing so, 'we must read the statute as a whole and give meaningful operation to each of its provisions.'" *In re $3,636.24 U.S. Currency*, 198 Ariz. 504, ¶ 10, 11 P.3d 1043, 1044 (App. 2000) (citation omitted), *quoting Ruiz v. Hull*, 191 Ariz. 441, ¶ 35, 957 P.2d 984, 993 (1998). The statute is not ambiguous. *See generally Carrasco*, 201 Ariz. 220, ¶¶ 4-6, 33 P.3d at 793.

¶7 Section 13-2409 states, in relevant part, that a person commits the offense of obstructing a criminal investigation or prosecution if the person "knowingly attempts by means of bribery, misrepresentation, intimidation or force or threats of force to obstruct, delay or prevent the communication of information or testimony relating to a violation of any criminal statute to a peace officer . . . ." In *Walker*, Division One of this court held that a defendant cannot be convicted of violating this statute based upon the defendant's misrepresentations to a law enforcement "officer who is investigating [the] defendant." 191 Ariz. 424, ¶ 12, 956 P.2d at 1249.

¶8 The state contends *Walker* is distinguishable because Waddles was attempting to keep the officer from discovering that another person was in the house. In this respect, the state maintains, Waddles was not necessarily trying to keep the officer from investigating her potential wrongdoing but that of a third person. The state also asserts that, to the extent we construe *Walker* in the same manner as Waddles, we should not follow it because either the relevant portion was merely dicta or because the case was wrongly decided.

¶9 We think *Walker* was correctly decided. Indeed, we relied on it to some extent in *Carrasco*, although we distinguished it there because "Carrasco was not trying to thwart an investigation into his own wrongdoing by giving false information directly to the police." 201 Ariz. 220, ¶ 8, 33 P.3d at 794. We added, "Moreover, the court in *Walker* never considered whether 'another' may also include a third person to whom a defendant has made a misrepresentation in order to prevent a victim or witness from aiding a police

investigation." *Id*. Nor can we dismiss as mere dicta those portions of Division One's decision that are relevant to this case; rather, we find *Walker* instructive here.

¶10 It is clear from the state's presentation of the evidence the officer was investigating possible wrongdoing in general and did begin to suspect Waddles immediately. After talking to her, his suspicions expanded to others who potentially were involved in some form of unlawful conduct. But, even assuming the investigation had related only to others who may have been engaged in suspicious activity at the home, the person to whom Waddles made the misrepresentation was the law enforcement officer, not some third person.

¶11 In any event, the prosecutor made clear during his closing argument that the charge against Waddles was based on her having lied to the officer about her connection to the van and whether there was another person in the house. And, the prosecutor continued, the reason she had lied was to keep the officer from talking to that other person "because she's going to get in trouble. . . . She's trying to keep the police away from her marijuana shipping operation, and that's what she's trying to do." As the court in *Walker* correctly stated, "[n]umerous laws exist to punish those who lie to government officials during traffic stops and elsewhere." 191 Ariz. 424, ¶ 14, 956 P.2d at 1249. Section 13-2409, in contrast, was "intended to prohibit anyone from utilizing misrepresentation to attempt to interfere with a criminal investigation or prosecution by preventing or delaying a witness's communication of information to the police." *Carrasco*, 201 Ariz. 220, ¶ 6, 33 P.3d at 793. This is not that case. Even assuming Waddles failed to assert this precise argument below,

the error is fundamental because Waddles could not have been convicted of this offense as a matter of law. The error is obviously prejudicial, having resulted in a conviction. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005) (error not asserted below is forfeited and must be both fundamental and prejudicial to warrant appellate relief).

¶12 Waddles next argues the charge of money laundering was duplicitous and, as a result, might have resulted in a violation of her right to a unanimous jury. Count two of the indictment charged her with having committed second-degree money laundering "by acquiring or maintaining an interest in, transacting, transferring, transporting, receiving or concealing the existence or the nature of racketeering proceeds knowing or having reason to know that they were the proceeds of an offense, to wit: TRANSPORTATION OF MARIJUANA FOR SALE." Waddles contends that, because this charge was based on either the $700 in her purse, which she claims the evidence shows clearly belonged to her, or the $30,000 found underneath a seat in the van, different jurors might have found her guilty based on either one of two different possibilities.

¶13 An indictment is duplicitous if it "charg[es] more than one crime in a single count or charg[es] what can be multiple counts of the same crime in a single count." *State v. Schroeder*, 167 Ariz. 47, 52 n.4, 804 P.2d 776, 781 n.4 (App. 1990). The reason duplicitous indictments are prohibited is "because they deny adequate notice of the charge to be defended, present a threat of a non-unanimous jury verdict, and render a precise pleading of prior jeopardy impossible in the event of a later prosecution." *State v. Petrak*,

198 Ariz. 260, ¶ 23, 8 P.3d 1174, 1180-81 (App. 2000). Waddles, however, did not challenge the indictment below and, therefore, is precluded from raising it on appeal, Rules 13.5(e) and 16.1(c), Ariz. R. Crim. P.; *State v. Anderson*, 210 Ariz. 327, ¶¶ 13-18, 111 P.3d 369, 377-78 (2005). *See State v. Urquidez*, 213 Ariz. 50, ¶ 4, 138 P.2d 1177, 1178 (App. 2006) (suggesting failure to object to defects in charging documents may not be subject to fundamental error review).

¶14 Nor can we say Waddles has established error in her related argument that her constitutional right to a unanimous jury verdict was violated. As the state correctly points out in its answering brief, relying on *State v. Encinas*, 132 Ariz. 493, 496-97, 647 P.2d 624, 627-28 (1982), a defendant only has a right to a unanimous verdict on the question whether the defendant committed a crime as defined by statute, not on the manner in which the defendant committed the crime.

¶15 We also agree with the state that *Petrak*, on which Waddles relies, is distinguishable. 198 Ariz. 260, 8 P.3d 1174. The defendant in that case was charged with weapons misconduct based on the use of a gun during the commission of a felony. *Id*. ¶ 2. Evidence was introduced that drugs and guns were found at the defendant's house and guns and a marijuana pipe were found in his car. *Id*. ¶ 4. The defendant argued on appeal that the trial court erred by "failing to instruct the jury that, to convict, it had to find more than a mere temporal nexus between the guns and the drugs that formed the factual basis for the charge." *Id*. ¶ 1. The court reversed Petrak's conviction, finding

> the indictment was unclear because it did not address the nexus between the guns and the drugs and which guns and drugs at which location formed the basis of the weapons misconduct charge. As a result, the indictment inadequately defined the charge, failed to notify Petrak of what evidence would be presented against him and, therefore, handicapped his defense.

Id. ¶ 29. Here, the prosecutor argued and the evidence established that the charge was based on Waddles's having possessed, at one time, a large amount of cash, some of it in her purse and some of it in the van that was under her control. She possessed all the cash simultaneously, and either portion independently could have satisfied the offense. We see no error, much less error that could be characterized as fundamental.

¶16 For the reasons stated above, we affirm the convictions and sentences imposed on all counts but count two, which we reverse.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

PHILIP G. ESPINOSA, Judge